IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 27, 2009

STATE OF TENNESSEE v. MAXWELL M. HODGE

Direct Appeal from the Criminal Court for Sullivan County
No. S51,738 Robert H. Montgomery, Jr., Judge

No. E2008-00720-CCA-R3-CD - Filed September 16, 2009

A Sullivan County Criminal Court jury found the appellant, Maxwell M. Hodge, guilty of theft of property valued over $1,000 but less than $10,000, driving on a revoked license, burglary of an automobile, and possession of burglary tools. The trial court imposed a total effective sentence of twelve years in the Tennessee Department of Correction. On appeal, the appellant challenges the sufficiency of the evidence, the trial court's refusal to allow the appellant's trial counsel to withdraw, and the trial court's denial of alternative sentencing. Upon review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

William A. Kennedy, Blountville, Tennessee, for the appellant, Maxwell M. Hodge.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Kent Chitwood and Kaylin Hortenstine, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

This case arose from the theft of a brown and white, three-quarter ton, 1969 Chevrolet pickup truck owned by the victim, Timothy Sean Scott. At trial, Jessee Ihrig testified that on January 19, 2006, he was driving on Interstate 81, accompanied by the victim. As they were driving, the victim said, "That looks like my truck up ahead." Ihrig started following the truck, and, when the men saw the license plate of the truck, they confirmed that the truck was indeed the victim's.

Ihrig said that the victim then called 911 to report the theft. Ihrig continued following the truck, and the victim relayed to the 911 operator information concerning the truck's whereabouts.

Ihrig saw a police officer stop the victim's truck. After the truck stopped, the appellant, who was the driver of the truck, got out and was handcuffed. Ihrig testified that he and the victim approached the truck to make a positive identification of the vehicle. Ihrig heard the appellant say that "his brother had brought him the truck running ready to go . . . [but] that if [the officer] asked [the appellant's] brother he would deny it." After the appellant was arrested, the officer allowed the victim to take possession of the truck.

The victim testified that on January 19, 2006, he was riding in Ihrig's truck, heading northbound on Interstate 81. The victim said, "We got off I-26 and about half mile ahead I told him that looked like my truck." The men drove closer, and the victim made a positive identification of the truck. The victim said he called 911, and Ihrig followed the truck. During the call, police dispatch told the victim to "back off and let [the police officer] do the stop." The victim stated that after a police officer stopped the truck, the appellant got out of the truck, and the officer handcuffed him. The officer asked the victim if the truck was his, and the victim responded affirmatively. The victim recalled that while he was standing near the truck making a positive identification of the vehicle, the appellant "made a statement, something that his brother gave him the truck, or brought the truck to him, might have been the exact words . . . [and] that if his brother was asked that he would probably deny it, or say no."

The victim said that police went through the truck "to see what was in it." The victim stated that police discovered a screwdriver in the truck but that the screwdriver was not his. He explained on January 17, 2006, he had parked the truck on State Street in Bristol and had placed a "for sale" sign in the window of the truck. Before doing so, the victim had cleaned the truck, leaving nothing inside. The victim said that he had not seen the truck again until he noticed it being driven by the appellant. The victim said he had not given the appellant permission to drive the truck.

The victim said that he drove his truck home after the appellant was arrested. The victim testified that prior to the theft, he had been able to start the truck with a key. However, there was no key in the truck when the appellant was stopped. The victim said that after the offense, "to restart it I had to put those wires back together and take a screwdriver and touch the two bundles of wires together and that would start it." The victim stated that he took the truck to a repair shop and that the repairs cost less than $200. The victim said that a few days later, while the truck was at the repair shop, he sold the truck for $3,700.

Kingsport Police Officer David Moore testified that on January 19, 2006, he received a call from dispatch about a stolen vehicle which was being followed by its owner. Officer Moore said he followed the directions relayed by dispatch and caught up with the truck. He signaled for the driver to stop, and the truck stopped near the airport/Highway 75 exit. Officer Moore and Ihrig parked behind the truck. Officer Moore stated that he then exited his vehicle and approached the truck with his weapon drawn. He ordered the driver, the appellant, to get out of the vehicle. Officer Moor said that the appellant walked to the rear of the vehicle and got on his knees. Officer Moore handcuffed the appellant and informed him of the reason for the stop. During the course of the stop, the appellant told Officer Moore that he had gotten the truck from his brother. Officer Moore said that at one point during the stop, Officer Aaron Grimes arrived to assist and that Officer Grimes placed the appellant in his patrol car. Officer Moore stated that he searched the truck and found a screwdriver and that the victim said the screwdriver did not belong to him. Officer Moore said that after the appellant was arrested, the truck was returned to the victim. Officer Moore said he did not have the screwdriver forensically tested.

Kingsport Police Officer Aaron Grimes testified that on January 19, 2006, he went to assist Officer Moore during a traffic stop. When he arrived at the scene, the appellant was handcuffed on the ground. Officer Grimes stated that the appellant told the officers that his brother gave him the truck. Officer Grimes recalled that following the appellant's arrest, he placed the appellant in the backseat of his police car and took him to jail. Officer Grimes said that on the way to jail, the appellant twice asked him if he would ask the victim "could we call this even" if the appellant agreed to pay the victim for repairing the damage done to the truck's wiring.

Based on the foregoing, the jury found the appellant guilty of theft of property valued more than $1,000 but less than $10,000, driving on a revoked license, burglary of an automobile, and possession of burglary tools. At the sentencing hearing, the trial court found that the appellant was a Range II offender and that the appellant had an extensive criminal history in addition to that necessary to classify him as a Range II offender. Additionally, the court noted that the appellant had repeatedly violated the terms of probation. Accordingly, the trial court imposed the maximum sentence for each conviction, namely eight years for the theft conviction, six months for the driving on a revoked license conviction, four years for the burglary conviction, and eleven months and twenty-nine days for the possession of burglary tools conviction. The court further ordered that the sentence for burglary be served consecutively to the sentence for theft for a total effective sentence of twelve years. The court denied the appellant's request for alternative sentencing.

On appeal, the appellant challenges the sufficiency of the evidence, the trial court's denial of counsel's pretrial request to withdraw from representation, and the trial court's denial of alternative sentencing.

II. Analysis

A. Jurisdiction

First, we will address the State's contention that the appeal should be dismissed because the record does not contain a written order denying the appellant's motion for new trial. The State contends that the minute entry included in the record on appeal is insufficient to confer jurisdiction "because the document purporting to be a minute entry is not signed by the trial judge and does not contain any indication that it is a copy of a minute entry signed by the trial judge."

Recently, in State v. Byington, 284 S.W.3d 220 (Tenn. 2009), our supreme court addressed this issue.[1] In Byington, the record did not include a written order denying the defendant's motion for new trial; however, the record did include a copy of a minute entry stating that the trial court had denied the motion for new trial. Id. at 224-25. Our supreme court concluded that "the minute entry

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[1] We note that the State's brief was filed before Byington was released.

. . . indicating that the trial court denied the motion for new trial is sufficient to confer jurisdiction on the Court of Criminal Appeals." Id. at 225. The court further noted that Tennessee Code Annotated section 16-1-106(a) (1994) requires that a trial court judge should sign "'the minute entries each day; however, where the orders of the court are photocopied . . . it shall be sufficient for the judge to sign at the end of the minute book approving all the minutes in the book.'" Id. Therefore, the court concluded that although the minute entry included in the record on appeal did not bear the trial judge's signature, "there is no proof that the judge did not sign the minutes on a subsequent page not included in the record before us, and we presume that the minutes were signed as required by section 16-1-106." Id. at 226. We conclude that the minute entry included in the appellate record is sufficient to confer jurisdiction upon this court.

B. Sufficiency of the Evidence

The appellant contests the sufficiency of the evidence supporting his convictions. He specifically argues:

> No witness was able to testify as to how the Appellant came into possession of the truck. The defense presented evidence that someone other than the Appellant had possession of the truck and brought it to his house. Evidence was not sufficient to convict.
>
> Furthermore, the State failed to conduct adequate forensic tests. Forensic evidence could have proven the existence of another person who took the truck.

On appeal, a jury conviction removes the presumption of the appellant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. See State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. See State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

Turning to the elements of the offenses, we note that generally, a theft of property occurs when someone, with the intent to deprive the owner of property, knowingly obtains or exercises control over the property without the owner's effective consent. Tenn. Code Ann. § 39-14-103 (2006). Tennessee Code Annotated section 39-14-402(a)(4) (2006) provides that

> (a) A person commits burglary who, without the effective consent of the property owner:
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> . . . .
>
> (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

Further, Tennessee Code Annotated section 39-14-701 (2006) provides that "[a] person who possesses any tool, machine or implement with intent to use the same, or allow the same to be used, to commit any burglary, commits a Class A misdemeanor." The indictment specifically alleged that the screwdriver was the burglary tool.

In the instant case, the victim said that he parked his truck and placed a "for sale" sign in the window. A couple of days later, the victim saw the appellant driving the victim's truck on the interstate. When police stopped the appellant, he said that he had obtained the truck from his brother. There were no keys in the truck; instead, the truck had been "hot wired" by using a screwdriver and loose wiring to start the ignition of the truck. The victim said that he had never met the appellant and that he had not given the appellant permission to drive the truck. The victim stated that a few days after the truck was returned to him, he sold the truck for $3,700.

This court has previously stated that "[p]ossession of recently stolen goods gives rise to an inference that the possessor has stolen them." State v. Tuttle, 914 S.W.2d 926, 932 (Tenn. Crim. App. 1995) (citing Bush v. State, 541 S.W.2d 391, 394 (Tenn. 1976)). Moreover, "[p]ossession of recently stolen goods may also be sufficient evidence to sustain a conviction for burglary." Id. (citing Brown v. State, 489 S.W.2d 855, 856 (Tenn. Crim. App. 1972)). We conclude that the foregoing evidence is sufficient to sustain the jury's finding of guilt as to theft, burglary, and possession of burglary tools. See State v. Tammy Garner, No. M2008-01253-CCA-R3-CD, 2009 WL 1362331, at *5 (Tenn. Crim. App. at Nashville, May 15, 2009).

Additionally, we note that the State adduced proof that the appellant's driver's license was suspended at the time of the incident. See Tenn. Code Ann. § 55-50-504(a)(1) (2008) ("A person who drives a motor vehicle within the entire width between the boundary lines of every way publicly maintained that is open to the use of the public for purposes of vehicular travel . . . at a time when the person's privilege to do so is cancelled, suspended, or revoked commits a Class B misdemeanor."). Therefore, there is sufficient evidence to support his conviction for driving on a revoked license.

C. Motion to Withdraw

The appellant contends that the trial court erred by not allowing the appellant's trial counsel to withdraw. In response, the State contends that the appellant did not raise the issue in his motion for new trial and that the issue is therefore waived. See Tenn. R. App. P. 3(e). We agree with the State.

The record reflects that on the morning of trial, the trial court noted that defense counsel had filed a motion to withdraw, asserting that the rules of professional conduct prohibited him from continuing to represent the appellant. Counsel stated that the appellant claimed that defense counsel was ineffective and that the appellant refused to communicate with counsel.[2] Counsel informed the court that the week prior to trial, the appellant told counsel that he wanted counsel to withdraw and refused to speak with counsel about the case. Counsel informed the court that the appellant's lack of cooperation had made it difficult to prepare a defense. The trial court told the appellant that the trial would proceed and that the appellant could choose to represent himself or, as the trial court advised, to proceed with defense counsel. The appellant chose to keep defense counsel, and the trial ensued.

On appeal, the appellant argues that the trial court should have permitted counsel to withdraw. The appellant maintains that he refused to discuss his case with counsel and that as a result, counsel was unable to prepare for trial. Generally, "[t]he decision whether to allow counsel to withdraw in a pending criminal matter is vested in the sound discretion of the trial court, and the decision will not be reversed on appeal unless an abuse of discretion is shown." State v. Russell, 10 S.W.3d 270, 274 (Tenn. Crim. App. 1999); see also Tenn. Code Ann. § 40-14-205(a) (2006) ("The court may, upon good cause shown, permit an attorney appointed under this part to withdraw as counsel of record for the accused.").

We note that the appellant failed to include his motion to withdraw in the record for our review. The appellant carries the burden of ensuring that the record on appeal conveys a fair, accurate, and complete account of what has transpired with respect to those issues that are the bases of appeal. Tenn. R. App. P. 24(b); see also Thompson v. State, 958 S.W.2d 156, 172 (Tenn. Crim. App. 1997). Ordinarily, "[i]n the absence of an adequate record on appeal, this court must presume that the trial court's rulings were supported by sufficient evidence." State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). Further, the appellant failed to include this issue in his motion for new trial. Failure to raise an issue of error, other than sufficiency of the evidence or sentencing, in a motion for a new trial waives that issue for purposes of appellate review. See Tenn. R. App. P. 3(e). Therefore, the appellant is not entitled to relief on this issue. See State v. Jashua Shannon Sides, No. E2006-01356-CCA-R3-CD, 2008 WL 538983, at *4 (Tenn. Crim. App. at Knoxville, Feb. 28, 2008), perm. to appeal denied, (Tenn. 2008).

D. Sentencing

Next, the appellant argues that the trial court erred in denying alternative sentencing. At the sentencing hearing, the appellant's grandfather, Clyde Jobe, testified that before the offenses, the appellant was living with him and helping him on the farm. Jobe stated that the appellant would be welcome in his home again and that he could use the appellant's help on his farm. Jobe said that the

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[2] The motion to withdraw was not included in the appellate record for our review.

appellant had changed and that he believed the appellant would do well on probation. Jobe acknowledged that the appellant had an extensive criminal history.

The appellant testified that he had changed his life since his release from prison. He maintained that he had a problem with alcohol and that he wanted to get treatment for his problem. He said that in October 2005, shortly before the instant offenses, he was released from prison after serving an eight-and-one-half-year sentence for a vehicle theft offense. He said that before his release, he had taken a "pre-release class." He stated that "if[, after release,] you start feeling like you was gonna get in trouble for something you was supposed to call the pre-release teacher." The appellant said that before the instant offenses he tried to call his teacher, but his calls were unanswered. The appellant stated that he then began drinking. The appellant acknowledged that since his release he had been convicted of at least five other charges in addition to the instant offenses.

At the conclusion of the sentencing hearing, the trial court sentenced the appellant, as a Range II, multiple offender, to eight years for the theft conviction, six months for the driving on a revoked license conviction, four years for the burglary conviction, and eleven months and twenty-nine days for the possession of burglary tools conviction. The court ran the sentences for theft and burglary consecutively for a total effective sentence of twelve years.

In determining whether the appellant was a suitable candidate for alternative sentencing, the trial court noted that the appellant had an extensive criminal history. Moreover, the court observed the appellant had previously been granted several probationary sentences, but he had failed to comply with the terms of his probation. The court stated, "I seriously doubt what the [appellant's] version of facts are in this case based upon his prior history." The court stated that the appellant committed the instant offenses within three months of being released from prison. Therefore, the trial court determined that the appellant was not a good candidate for alternative sentencing.

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2006). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement by the appellant in his own behalf; and (8) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence(s). See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

Generally, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony should be considered a favorable candidate for alternative sentencing absent evidence to the contrary. See Tenn. Code Ann. § 40-35-102(6). The trial court correctly found that the appellant is a Range II, multiple offender. Therefore, he is not considered to be a favorable candidate for alternative sentencing. However, an appellant is eligible for alternative sentencing if the sentence actually imposed is ten years or less. See Tenn. Code Ann. § 40-35-303(a) (2006). The appellant's sentences meet this criteria.

Under the 1989 Sentencing Act, sentences which involve confinement are to be based on the following considerations contained in Tennessee Code Annotated section 40-35-103(1):

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
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> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

See also State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). Additionally, a court should consider the defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. See Tenn. Code Ann. § 40-35-103(5).

The appellant's presentence report reflects that the thirty-year-old appellant has convictions for public intoxication, attempted grand larceny, two counts of felony failure to appear, four counts of theft of property valued between $1,000 and $10,000, theft of property valued less than $500, two counts of reckless endangerment, vandalism, several traffic offenses, four counts of driving on a revoked license, two counts of felony evading arrest, five counts of driving under the influence, four counts of public intoxication, two counts of assault, disorderly conduct, unauthorized use of a vehicle, four counts of possession of intoxicating liquor by a minor, and contributing to the delinquency of a minor. Based upon the foregoing, the trial court found that the appellant had a long history of criminal conduct. Further, the court observed that on at least five occasions, the appellant amassed new charges while he was on probation. The trial court denied alternative sentencing based upon the appellant's long criminal history and his repeated failure to comply with measures less restrictive than confinement. Our review of the record leads us to conclude that the trial court did not err in denying the appellant alternative sentencing.

III. Conclusion

Finding no error, we affirm the judgments of the trial court.

NORMA McGEE OGLE, JUDGE